Supreme Court, U.S.
FILED
07-478 OCT 03 2007
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

DETLEF F. HARTMANN,

Petitioner,

vs.

THOMAS CARROLL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Of counsel:
DONALD B. AYER
SAMUEL ESTREICHER
MEIR FEDER
NYU LAW SCHOOL
SUPREME COURT
CLINIC
40 Washington Sq. South
New York, NY 10012
(212) 998-6226

DAVID R. FINE
(Counsel of Record)
CHRISTOPHER R. NESTOR
KIRKPATRICK &
LOCKHART PRESTON
GATES ELLIS LLP
17 North Second St.
18th Floor
Harrisburg, PA 17101
(717) 231-4500

Counsel for Petitioner
Detlef F. Hartmann

QUESTION PRESENTED

There is a split among the circuits with respect to the following question:

Whether a motion filed in state court for discretionary review of a sentence is an "application for State post-conviction or other collateral review," 28 U.S.C. § 2244(d)(2), thus tolling the Antiterrorism and Effective Death Penalty Act's one-year limitations period for a state prisoner to file a federal *habeas corpus* petition.

LIST OF PARTIES

Petitioner Detlef F. Hartmann is an inmate incarcerated in Delaware pursuant to a sentence of a Delaware state court. Respondent is Thomas Carroll, the warden of the facility in which Mr. Hartmann is incarcerated.

TABLE OF CONTENTS

Page

Questions Presented i

List of Parties ii

Table of Contents iii

Table of Authorities v

Opinions Below 1

Jurisdiction 1

Statutory Provisions Involved 1

Statement of the Case 1

Factual Background 1

Proceedings Below 2

Reasons for Granting the Writ 5

I. The Courts of Appeals are split over whether a post-conviction motion for discretionary review of a state-court sentence tolls the AEDPA's limitations period 6

II. The circuit split produces inconsistent holdings on the rights of state inmates to pursue federal *habeas* relief, intolerable uncertainty in those circuits that have not yet decided the issue and unseemly overlap of state and federal proceedings 9

III. The Third Circuit's decision is unsupported by the plain language of Section 2244(d)(2), and it conflicts with longstanding principles of comity and federalism 12

Conclusion 17

TABLE OF APPENDICES

Appendix A – Opinion of the United States Court of Appeals for the Third Circuit entered July 9, 2007 ..... 1a

Appendix B – Opinion of the United States District Court for the District of Delaware entered November 16, 2004 ..... 14a

Appendix C – Section 2244, Title 28, United States Code 29a

Appendix D – Delaware Superior Court Criminal Rule 35(b) 33a

TABLE OF AUTHORITIES

Page

Federal Cases

Artuz v. *Bennett*, 531 U.S. 4 (2000) 16

Bridges v. *Johnson*, 284 F.3d 1201 (CA11 2002) 5, 8

Cunningham v. *California*, 127 S.Ct. 856 (2007) 14

Day v. *McDonough*, 547 U.S. 198 (2006) 11

Duncan v. *Walker*, 533 U.S. 167 (2001) 13, 14

Evans v. *Chavis*, 546 U.S. 189 (2006) 11

Hartmann v. *Carroll*, 492 F.3d 478 (CA3 2007) ..... *passim*

Howard v. *Ulibarri*, 457 F.3d 1146 (CA10 2006) 5, 7

Juidice v. *Vail*, 430 U.S. 327 (1977) 10

Lawrence v. *Florida*, 127 S.Ct. 1079 (2007) 11

Middlesex County Ethics Comm. v. *Garden State Bar Association*, 457 U.S. 423 (1982) 10

Pace v. *DiGugliemo*, 544 U.S. 408 (2006) 11

Pennsylvania Department of Corrections v. *Yeskey*, 524 U.S. 206 (1998) 13

Robinson v. *Golder*, 443 F.3d 718 (CA10 2006) 5, 7, 15

Rose v. *Lundy*, 455 U.S. 509 (1982) 14

Steffel v. *Thompson*, 415 U.S. 452 (1974) 10

Thompson v. *Keohane*, 516 U.S. 99 (1995) 6

Walkowiak v. *Haines*, 272 F.3d 234 (CA4 2001) .....*passim*

Younger v. *Harris*, 401 U.S. 37 (1971) 10

Federal Statutes

28 U.S.C. § 2244 .....*passim*

28 U.S.C. § 2253(c)(1) 4

28 U.S.C. § 2254 .....*passim*

28 U.S.C. § 1254(1) 1

28 U.S.C. §§ 1291 4

28 U.S.C. §§ 1331 1

State Statutes

11 Del. C. § 4217 2

13 Vt. Stat. Ann. § 7042 (1998) 11

730 Ill. Comp. Stat. 5/5-8-1 (West Supp. 2007) 10

Conn. Gen. Stat. Ann. § 53a-39 (West 2001) 10

Georgia Code § 17-10-6 8

Ind. Code Ann. § 35-38-1-17 (West Supp. 2007)....10

Okla. Stat. Ann. tit. 22 10

S.D. Cod. Laws § 23A-31-1 (1998)....10

Va. Code Ann. § 19.2-303 (Supp. 2007) 11

Wis. Stat. § 973.195 (2006)....10

State Rules

Colo. R. of Crim. P. 35(b) ....*passim*

Del. Sup. Ct. Crim. R. 35(b) 12, 15

Haw. R. Pen. P. 35(b)....10

Idaho Crim. R. 35 10

N.M. R. Crim. P 5-801 10

N.M. R. Crim. P. 5-801(B) 7

W.Va. Crim. P. R. 35(b) 8

Other Authorities

BLACK'S LAW DICTIONARY (2004)....12, 13

John Gleeson, "The Road to Booker and Beyond: Constitutional Limits on Sentence Enhancements," 21 TOURO L. REV. 873 (2006) 14

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993) 12

Petitioner Detlef F. Hartmann respectfully requests that a writ of *certiorari* issue to resolve a split among the federal courts of appeals.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A) is reported at *Hartmann* v. *Carroll*, 492 F.3d 478 (CA3 2007). The opinion of the district court (Appendix B) is unreported but available at *Hartmann* v. *Carroll*, No. 03-cv-00796, 2004 U.S. Dist. LEXIS 25165 (D. Del., Nov. 16, 2004).

JURISDICTION

The court of appeals entered its judgment on July 9, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The court of appeals and the district court had jurisdiction under 28 U.S.C. §§ 1331 and 2254.

STATUTORY PROVISIONS INVOLVED

Section 2244 of Title 28, United States Code, and Delaware Superior Court Criminal Rule 35(b) are excerpted in relevant part in Appendices C and D, respectively.

STATEMENT OF THE CASE

Factual Background

In March 2001, Detlef F. Hartmann pleaded guilty in the Delaware Superior Court to felony charges.[1] The Superior Court sentenced Mr. Hartmann on March 29, 2001, to an aggregate 19

---

[1] This description of the facts is drawn from the opinions of the Third Circuit and the district court.

years of incarceration. Mr. Hartmann did not appeal his conviction or sentence. He is currently incarcerated in the Delaware Correctional Center in Smyrna, Delaware.

Proceedings Below

Pursuant to Delaware Superior Court Criminal Rule 35(b),[2] Mr. Hartmann filed in the Delaware Superior Court two motions for sentence reconsideration, reduction or modification: one on June 29, 2001, and the other on July 26, 2001.[3] The Superior Court denied both motions on June 25, 2002.

On November 12, 2002, Mr. Hartmann filed a motion in the Superior Court titled "Motion to Dismiss," arguing, among other things, that the Superior Court did not have jurisdiction over the charges in the indictment, that his counsel had been ineffective for failing to address this defect and that his constitutional rights had been violated. The Superior Court, in a November 19, 2002, letter order to Mr. Hartmann, struck the motion.

Mr. Hartman timely appealed the Superior Court's November 19, 2002, letter order to the Delaware Supreme Court. On March 20, 2003, the Delaware Supreme Court affirmed the order. Noting that it was "clear" that, in his "Motion to Dismiss," Mr. Hartmann was seeking relief pursuant to Delaware Superior Court Criminal Rule 61, the court explained that the Superior

---

[2] The text of the rule appears in Appendix D to this petition.

[3] The Delaware trial court granted Mr. Hartmann an extension of time in which to file his motions, and so they were timely filed under Delaware court rules.

Court did not abuse its discretion in striking the motion as a nonconforming document "to the extent that" the motion did not comply with Rule 61. The Delaware Supreme Court also held that Mr. Hartmann's substantive argument was without merit.

On August 4, 2003, Mr. Hartmann filed a petition for federal collateral relief under 28 U.S.C. § 2254. The district court dismissed the petition as time-barred under the one-year limitations period in 28 U.S.C. § 2244(d)(1). The district court found that Mr. Hartmann's conviction became final on April 30, 2001, and that he did not file his Section-2254 petition until August 4, 2003 – more than two years later.

Although the application would have been timely had the limitations period been tolled both by the Delaware Superior Court Criminal Rule 35(b) motion and by the "Motion to Dismiss," the district court determined that Mr. Hartmann's "Motion to Dismiss" could not toll the limitations period because it was not a "properly filed" application for state post-conviction relief under Section 2244(d)(2). Thus, the district court held that Mr. Hartmann's Section-2254 petition was untimely regardless of whether his Rule 35(b) motion tolled the limitations period. The district court therefore declined to address the tolling effect of Mr. Hartmann's Rule 35(b) motion.

Mr. Hartmann appealed. The Third Circuit entered a certificate of appealability and appointed counsel. In the certificate, the court requested briefing on "whether Appellant's motions to reduce sentence are 'applications for State post-conviction

or other collateral review' under 28 U.S.C. § 2244(d)(2).[4]

At oral argument, the Third Circuit panel questioned counsel almost exclusively about the Rule 61 issue, and the judges seemed uncertain about its resolution. In the written opinion, however, the panel set aside that difficult issue and focused solely on the Delaware Superior Court Criminal Rule 35(b) issue.

The Third Circuit held that a motion under Rule 35(b), which allows for a reduction of sentence without regard to the legality of the sentence, is not an "application for State post-conviction or other collateral review" that would allow statutory tolling of the one-year limitations period in the Antiterrorism and Effective Death Penalty Act (the "AEDPA"). *See* 28 U.S.C. § 2244(d)(2). In so holding, the Third Circuit followed the holdings of the Fourth and Eleventh Circuits with respect to analogous state rules in West Virginia and Georgia, respectively. The Third Circuit agreed with the Fourth Circuit that a motion for reduction of sentence without regard to the legality of the sentence is not an application for review that is "collateral" to the original judgment. *Hartmann*, 492 F.3d at 483, citing *Walkowiak* v. *Haines*, 272 F.3d 234, 237-38 (CA4 2001). The Third Circuit

---

[4] In the certificate of appealability, the court also requested briefing on

> (2) whether Appellant's motion to dismiss the indictment was not "properly filed" and did not toll the AEDPA statute of limitations. As to issue (2), the parties are also directed to include in their briefs a discussion of whether the Delaware Supreme Court's opinion in Hartmann v. State of Delaware, 818 A.2d 970 (Table), 2003 WL 1524623 (Del. March 20, 2003) constitutes a ruling on the merits on the motion to dismiss the indictment.

also cited approvingly to the Eleventh Circuit's conclusion that tolling for leniency motions does not promote exhaustion and finality of state court judgments by reducing the time in which federal review is sought. *Id.* at 483, citing *Bridges* v. *Johnson*, 284 F.3d 1201, 1203 (CA11 2002).

Noting that the decisions of the circuit courts are "discordant," the Third Circuit expressly declined to follow the Tenth Circuit, which had reached the opposite conclusion with respect to analogous state rules in Colorado and New Mexico. The Tenth Circuit based its decisions on comity because the state court, like the Delaware Superior Court in this case, had retained jurisdiction of the leniency proceeding during its pendency. *Hartmann*, 492 F.3d at 483, discussing *Robinson* v. *Golder*, 443 F.3d 718, 720-21 (CA10), *cert. denied*, __ U.S. __, 127 S. Ct. 166 (2006) and *Howard* v. *Ulibarri*, 457 F.3d 1146, 1149-50 (CA10 2006). The Third Circuit explained that "we are not persuaded by the reasoning of the Tenth Circuit," and it concluded that the AEDPA's limitations period is "tolled only by 'state post-conviction or other collateral review' – not by just any pending state-court proceeding." 492 F.3d at 483.

REASONS FOR GRANTING THE WRIT

The federal courts of appeals are now split on the issue presented in this case: whether a motion filed in a state trial court seeking discretionary review of a state-court sentence without regard to the legality of the sentence qualifies as an "application for State post-conviction or other collateral review" such that the AEDPA's limitations period is tolled during the pendency of such a motion. Three courts of appeals, including the Third Circuit in this case, now hold

that such a motion does not toll the running of the statute of limitations. One court of appeals has reached the contrary conclusion. The split among these four circuits is longstanding and entrenched.

Moreover, there remain eight circuits that have not yet resolved this purely legal issue.

Given that more than half of the states have such discretionary-review provisions, the existing circuit split and the unresolved state of the issue in the remaining circuits create uncertainty and inconsistency in application of what should be a straightforward procedural issue that has great importance to inmates seeking federal *habeas* review. This Court should step in to bring uniformity to the issue.

I. THE COURTS OF APPEALS ARE SPLIT OVER WHETHER A POST-CONVICTION MOTION FOR DISCRETIONARY REVIEW OF A STATE-COURT SENTENCE TOLLS THE AEDPA'S LIMITATIONS PERIOD.

The holding of the court below that a motion for a discretionary reduction of sentence is not an "application for State post-conviction or other collateral review" that tolls AEDPA's limitations period is in direct conflict with two decisions of the Tenth Circuit. In adopting the position previously accepted by the Fourth and Eleventh Circuits, and expressly disagreeing with the Tenth-Circuit rule, the Third Circuit has thus expanded a clear conflict among the courts of appeals in an area of law in which this Court has said that "uniformity among federal courts is important . . . ." *Thompson* v. *Keohane*, 516 U.S. 99, 106 (1995).

Just last year, the Tenth Circuit held that the AEDPA limitations period is tolled by a motion

for reduction of sentence under Colorado Rule of Criminal Procedure 35(b), a rule nearly identical to the Delaware rule at issue in this case. *Robinson* v. *Golder*, 443 F.3d 718, 720-21 (CA10 Cir. 2006). Citing two of its previous unpublished decisions addressing the issue, the Tenth Circuit reasoned in *Robinson* v. *Golder* that there is no authority that "application[s] for State post-conviction or other collateral review," as those words are used in 28 U.S.C. § 2244(d)(2), should be limited to those containing "constitutional challenges to the defendant's conviction." *Martin* v. *Embry*, No. 99-1203, 1999 U.S. App. LEXIS 32147 (CA10 Dec. 8, 1999); and *Upshur* v. *Hickock*, No. 99-1156, 1999 U.S. App. LEXIS 22090 (CA10 Sept. 13, 1999). Additionally, the court concluded that to "hold otherwise would raise questions of comity, because it appears that Colorado retain[s] jurisdiction over the case during the pendency of [a] Rule 35(b) motion." *Id.* at 721 (quoting *Martin*).

A few months later, the Tenth Circuit reaffirmed this position, expressly disagreeing with a prior decision of the Fourth Circuit and holding unanimously (and without oral argument) that a motion for modification of sentence under New Mexico Rule of Criminal Procedure 5-801(B) tolls AEDPA's limitations period. *Howard* v. *Ulibarri*, 457 F.3d 1146, 1149-50 (CA10 2006) (opinion by McConnell, J.) (citing *Truelove* v. *Smith*, 9 Fed. Appx. 798, 802 (CA10 2001)(unpublished opinion holding same)). In *Howard* v. *Ulibarri*, the court agreed that New Mexico's rule is "substantively identical" in all relevant respects to the Colorado rule addressed in *Robinson*. The New Mexico rule allows a defendant to file a motion for a reduction of his sentence within 90 days after the conviction and sentence are final. *See* N.M. R. Crim. P. 5-801(B); Colo. R. Crim. P. 35(b); Del. Super. Ct. Crim. R. 35.

Decisions by the Fourth, Eleventh and now the Third Circuit are in direct conflict with the Tenth Circuit's decisions in *Robinson* and *Howard*. In *Walkowiak* v. *Haines*, 272 F.3d 234 (CA4 2001), the Fourth Circuit determined that a motion for "correction or reduction of sentence" pursuant to West Virginia Criminal Procedure Rule 35(b) did not toll AEDPA's limitations period. *Walkowiak*, 272 F.3d at 239. The court reasoned that the "plain language interpretation of the section" requires that it be limited to post-conviction review that is "collateral." *Id.* It then concluded that because the consideration of the Rule 35(b) motion is not separate and distinct from the original proceeding in which the defendant was sentenced and does not entail a legal challenge to the original sentence, such a proceeding is not "collateral" within the meaning of AEDPA. *Id.* at 237-38.

In *Bridges* v. *Johnson*, 284 F.3d 1201, 1204 (CA11 2002), the Eleventh Circuit held that petitioner's application to a state sentence review panel pursuant to Georgia Code Section 17-10-6 seeking discretionary sentence review did not constitute a post-conviction proceeding for the purposes of tolling AEDPA's limitations period. The court noted that the "sentence review panel's sole task is to determine whether the sentence . . . [is] excessively harsh," and thus reasoned that "viewing [Georgia Code Section 17-10-6] as a means to toll the limitations period would not enhance exhaustion of state review or finality of state court judgments." *Id.* at 1203-04.

In sum, the conflict among the circuits is clear and direct, and it evidences an explicit and mutually acknowledged disagreement on a pure issue of law.

II. THE CIRCUIT SPLIT PRODUCES INCONSISTENT HOLDINGS ON THE RIGHTS OF STATE INMATES TO PURSUE FEDERAL *HABEAS* RELIEF, INTOLERABLE UNCERTAINTY IN THOSE CIRCUITS THAT HAVE NOT YET DECIDED THE ISSUE AND UNSEEMLY OVERLAP OF STATE AND FEDERAL PROCEEDINGS.

There are more than one million prisoners incarcerated by the states. *See* William J. Sabol *et al.*, Bureau of Just. Stat., U.S. Dep't of Just., Bulletin No. NCJ 217675, Prison and Jail Inmates at Midyear 2006, at 2 (2007), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf. All state prisoners have the right to pursue federal *habeas* remedies. A majority of the states allow prisoners to file a motion for discretionary sentence review.[5] Thus, the conflict among the circuits on the issue of the tolling effect of state discretionary sentence review proceedings is a real issue for hundreds or perhaps thousands of state prisoners each year. This conflict among four circuits creates an intolerable level of uncertainty on an important recurring issue of procedure. The uncertainty and disruption is most egregious in the eight circuits that have yet to address the issue.

In view of the existing split in the circuit courts, a state prisoner – depending on the law of the circuit he is in – may or may not lose his right to pursue federal *habeas* review if he waits to file his petition until after the state court's determination of his motion for discretionary sentence reduction. In the Tenth Circuit, such a motion for discretionary sentence review tolls the one-year limitation period. In the Third, Fourth and Eleventh Circuits, it does not. Of still greater

---

[5] *See, infra*, note 6.

concern, in the majority of circuits where the issue has yet to be resolved, there is no way to know what the governing law is or will be, and prudence counsels inmates to file their federal *habeas* petitions within a year even if a state-court motion for discretionary sentence review remains unresolved.

The result is thus to make unavoidable a pattern of unseemly and wasteful simultaneous state and federal proceedings pertaining to the same state prisoners. This result is not only inefficient, it is in substantial tension with numerous decisions of this Court that evidence great concern about avoiding state and federal proceedings – especially relating to law enforcement – that overlap and concern the same subject matter. *E.g., Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423, 433–34 (1982); *Juidice* v. *Vail*, 430 U.S. 327, 335 (1977); *Steffel* v. *Thompson*, 415 U.S. 452, 460 (1974); *Younger* v. *Harris*, 401 U.S. 37, 43 (1971).

No fewer than half the states (and the District of Columbia), and at least one state in every circuit, have provisions nearly identical to Delaware Superior Court Criminal Rule 35(b).[6]

---

[6] *See, e.g., See, e.g.*, Mass. R. Crim. P. 29 (CA1.); N.Y. R. Crim. P. 450.15, 450.30 (CA2); N.J. Ct. R. 3:21-10 (CA3); Va. Ann. § 19.2-303 (2003) (CA4); La. Code Crim. Proc. Ann., art. 881.1 (CA5); Tenn. R. Crim. P. 35 (CA6); Wis. Stat. § 973.195 (2006) (CA7); N.D. R. Crim. P. 35 (CA8); Alaska R. Crim. P. 35 (CA9); Colo. R. Crim. P. 35 (CA10); Fla. R. Crim. P. 3.800 (CA11); D.C. Sup. Ct. R. Crim. P. 35 (CADC); *see also*, Conn. Gen. Stat. Ann. § 53a-39 (West 2001); Del. Super. Ct. Crim. R. 35, D.C. Sup. Ct. R. Crim. P. 35; Haw. R. Pen. P. 35(b); Idaho Crim. R. 35; 730 Ill. Comp. Stat. 5/5-8-1 (West Supp. 2007); Ind. Code Ann. § 35-38-1-17 (West Supp. 2007); Me. R. Crim. P 35(c); Md. R. 4-344, 4-345; N.M. R. Crim. P 5-801; Okla. Stat. Ann. tit. 22, § 982a (West 2003); Pa. R. Crim P. 720; R.I. Super. R. Crim. P. 35; S.D. Codified Laws § 23A-31-1 (1998); Tenn. R. Crim. P. 35; 13 Vt. Stat. Ann. § 7042

Thus the specter of state prisoners being heard or excluded from federal court by the application of flatly inconsistent constructions of AEDPA's tolling provision is truly a problem of national proportions.

In recent years, this Court has repeatedly recognized the need for uniformity in the interpretation of AEDPA's tolling provision. In the past two terms alone, the Court has resolved four cases dealing with the application of the statute of limitations in *habeas* cases. *See Lawrence* v. *Florida*, 127 S.Ct. 1079, 1081 (2007) (tolling effect of petition for *certiorari*); *Day* v. *McDonough*, 547 U.S. 198, 202 (2006) (effect of miscalculation by state court of the elapsed time under AEDPA's limitations period); *Evans* v. *Chavis*, 546 U.S. 189, 192 (2006) (timeliness of an appeal filed three years after the lower court's judgment); *Pace* v. *DiGugliemo*, 544 U.S. 408, 410 (2006) (tolling effect of an untimely state post-conviction petition for *habeas*).

The flat inconsistency in circuit rules, the resulting great uncertainty confronting inmates, government attorneys, and courts alike about the tolling effect of discretionary state sentence review proceedings and the inevitable consequence of widespread simultaneous state and federal litigation concerning the same inmate, call out for review by this Court at least as clearly as the issues presented in those cases.

(1998); Va. Code Ann. § 19.2-303 (Supp. 2007); W. Va. R. Crim. P. 35(b).

III. THE THIRD CIRCUIT'S DECISION IS UNSUPPORTED BY THE PLAIN LANGUAGE OF SECTION 2244(d)(2), AND IT CONFLICTS WITH LONGSTANDING PRINCIPLES OF COMITY AND FEDERALISM

This case presents the straightforward question of whether an application to a state court for the reduction of a state-imposed sentence is an "application for State post-conviction or other collateral review with respect to the pertinent judgment" within the meaning of AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2). The court below erred by holding—contrary to the plain language of Section 2244(d)(2) and the principles of comity and federalism underlying the AEDPA—that it is not.

As a threshold matter, a motion pursuant to Delaware Rule of Criminal Procedure 35(b) is a [1] "post-conviction" application for [2] "review with respect to the pertinent judgment." First, Rule 35(b) provides that "[t]he court may reduce a sentence of imprisonment on a motion made within 90 days *after the sentence is imposed*" (emphasis added). There is thus no question that the rule describes a "post-conviction" proceeding. Second, a motion pursuant to Rule 35(b) is one for "review with respect to the pertinent judgment." In common usage, "review" means simply "to examine again." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1944 (1993) (definition 2). In legal usage, "review" likewise means the "[c]onsideration, inspection, or reexamination of a subject or thing." BLACK'S LAW DICTIONARY 1345 (2004) (definition 1). Because a Rule-35(b) motion asks the court to review a sentence in the ordinary sense of examining it again, it is one for "review" within the meaning of Section 2244(d)(2).

A motion to reduce a sentence furthermore initiates "collateral" review under Delaware law. In general, collateral review denotes proceedings "other than a direct appeal" that nonetheless draw the outcome of a prior proceeding into question. BLACK'S LAW DICTIONARY 278 (2004) (defining "collateral attack"). Rule 35(b) provides that the deadline for filing the motion "shall not be interrupted or extended by an appeal," and that "[t]he court may decide the motion or defer decision while an appeal is pending." The rule thus contemplates a separate, distinct and ancillary proceeding—one that is "collateral" according to the plain meaning and common usage of that term. *Id.*

To be sure, Congress could have restricted Section 2244(d)(2) to the most common type of collateral review, state *habeas* proceedings. The statute's broad language, however, does not support so restricted a construction. *Cf. Duncan* v. *Walker*, 533 U.S. 167, 177 (2001) ("[T]he tolling provision applies to all types of state collateral review available after a conviction and not just to those denominated 'post-conviction' in the parlance of a particular jurisdiction."). "A petition for a writ of habeas corpus is *one type* of collateral attack." BLACK'S LAW DICTIONARY 278 (2004) (emphasis added). And, as this Court has observed, "the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 212 (1998) (citations omitted).

In addition to disregarding the plain language of Section 2244(d)(2), the decision below conflicts with the basic principles underlying the AEDPA—"comity, finality, and federalism." *Duncan*, 533 U.S. at 178. As this Court has explained, the AEDPA's tolling provision strikes a

balance between exhaustion and finality: the provision "promotes the exhaustion of state remedies," while "limiting the harm to the interest in finality by according tolling effect only to 'properly filed application[s] for State post-conviction or other collateral review." *Duncan*, 533 U.S. at 179–80.

Construing the provision to include a state's review of a sentence respects that balance. First, tolling the limitations period quite plainly promotes the exhaustion of state remedies by "encourag[ing] state prisoners to seek full relief first from the state courts." *Rose* v. *Lundy*, 455 U.S. 509, 518–19 (1982). While the exhaustion requirement operates principally to allow state courts to correct constitutional error, the line between constitutional error and a misuse of discretion in a sentencing proceeding is not always obvious. *See, e.g.*, *Cunningham* v. *California*, 127 S. Ct. 856, 862-63, 869 n.14 (2007) (noting disagreement with Justice Alito and Justice Kennedy as to whether finding a "circumstance in aggravation" violates the Sixth Amendment). *See, also,* John Gleeson, *The Road to Booker and Beyond: Constitutional Limits on Sentence Enhancements*, 21 TOURO L. REV. 873, 881 (2006) (describing confusion in "every federal court" as to which sentencing enhancements violated *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000)). Because it may give the petitioner all the relief he seeks, state review may avert federal *habeas* review altogether, a longstanding goal of the exhaustion requirement.

Second, tolling the AEDPA's limitations period during a state's review of a sentence avoids the specter of simultaneous proceedings challenging the same sentence in both state and federal court. As discussed above, this Court has often counseled against federal interference in

state-court proceedings. Yet interference is exactly what the decision below demands. A petitioner might file a motion under Rule 35(b) 60 days after his conviction became final. If, during the subsequent 305 days the petitioner exhausted his other state-court remedies and the state court did not resolve the Rule 35(b) motion, the petitioner would be required to file a federal *habeas* corpus petition to preserve his right to federal review. 28 U.S.C. §§ 2244(d), 2255. As the Tenth Circuit reasoned, allowing this result "would raise questions of comity," because the state court "retain[s] jurisdiction over the case during the pendency of [a] Rule 35(b) motion." *Robinson* v. *Golder*, 443 F.3d 718, 721 (CA10 2006) (citation omitted).

Finally, construing Section 2244(d)(2) to extend to a state's review of a sentence does not threaten the finality of state sentences. Delaware's Rule 35(b), like analogous state rules, requires that an application for the reduction of sentence be made shortly after sentence is imposed. *See* Del. Super. Ct. Crim. R. 35(b) (90 days); *see, e.g.*, Ariz. Crim. Proc. R. 24.3 (60 days); N.J. Crim. Proc. R. 3:21-10 (60 days). The Third Circuit's concern that construing Section 2244(d)(2) to include a state's review of a sentence would "create an incentive for prisoners to file frivolous requests for leniency merely as a delay tactic" *Hartmann*, 492 F.3d at 484. is thus misplaced. Delaware designed its system of criminal procedure with finality in mind. Federal deference to that system will promote, not threaten, the finality of state judgments.

Most important, however, is that Congress has already balanced the interests of exhaustion and finality by providing that all forms of "state post-conviction or other collateral relief" toll the limitations period. The only permissible

interpretation of Section 2244(d)(2)'s broad language is that it tolls the limitation period during a state court's review of a sentence. That language "may, for all we know, have slighted policy concerns on one or the other side of the issue as part of the legislative compromise that enabled the law to be enacted." *Artuz* v. *Bennett*, 531 U.S. 4, 10 (2000). The decision below, which added to a growing circuit split on the scope and application of the AEDPA's limitations period, ignored Congress's resolution of the issue and was accordingly in error.

The Third, Fourth and Eleventh Circuits have incorrectly held that state motions for discretionary sentence review do not toll the AEDPA's limitations period under Section 2244(d)(2). Their reasoning runs counter to the language of the statute and to the principle of comity. The Tenth Circuit correctly held to the contrary. In any event, the circuits are now plainly split on the question, and this Court should accept review to resolve the legal question presented in this petition.

CONCLUSION

The Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

DAVID R. FINE
(Counsel of Record)
CHRISTOPHER R. NESTOR
KIRPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
17 North Second St., 18th Floor
Harrisburg, PA 17101
(717) 231-4500

Of counsel:
DONALD B. AYER
SAMUEL ESTREICHER
MEIR FEDER
NYU LAW SCHOOL
SUPREME COURT CLINIC
40 Washington Sq. South
New York, NY 10012
(212)998-6226

Counsel for Petitioner
Detlef F. Hartmann

OCTOBER 2007

Appendix A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-4550

DETLEF F. HARTMANN,

Appellant

v.

THOMAS CARROLL, Warden;
ATTORNEY GENERAL OF STATE OF DELAWARE

OPINION

Before: Roth, Barry and Irenas (district judge, sitting by designation)

ROTH, Circuit Judge:

Detlef F. Hartmann is an inmate at the Delaware Correctional Center in Smyrna, Delaware. He has filed an application for federal habeas relief under 28 U.S.C. § 2254. The United States District Court for the District of Delaware dismissed the application as time-barred under the one-year limitations period set forth in 28 U.S.C. § 2244(d)(1). Hartmann appeals, arguing that his application was timely because his filing of various motions in Delaware state court tolled the limitations period in accordance with § 2244(d)(2).

Because we conclude that Hartmann's motion under Delaware Superior Court Criminal Rule 35(b) did not meet the tolling requirements of § 2244(d)(2), we will affirm the judgment of the District Court, dismissing Hartmann's petition as untimely.

I. Background

On March 29, 2001, Hartmann pled guilty in Delaware Superior Court to one count of second degree unlawful sexual intercourse and two counts of unlawful sexual contact. The victim of each count was a minor child. Hartmann was immediately sentenced, consistent with the plea agreement, to an aggregate of nineteen years of incarceration, suspended with decreasing levels of supervision after the mandatory minimum term of ten years. Hartmann did not appeal either his conviction or his sentence.

On June 29, 2001, pursuant to Delaware Superior Court Criminal Rule 35(b), Hartmann filed a *pro se* motion in the Superior Court for sentence reconsideration, reduction, or modification.[1] In this motion, he sought a reduction

---

[1] Del. Super Ct. Crim. R. 35(b) provides, in full:

Reduction of Sentence. The court may reduce a sentence of imprisonment on a motion made within 90 days after the sentence is imposed. This period shall not be interrupted or extended by an appeal, except that a motion may be made within 90 days of the imposition of sentence after remand for a new trial or for resentencing. The court may decide the motion or defer decision while an appeal is pending. The court will consider an application made more than 90 days after the imposition of sentence only in extraordinary circumstances or pursuant to 11 Del. C. § 4217. The court will not consider repetitive requests for reduction of sentence. The court may suspend the costs or

in his sentence on the basis of thirteen "mitigating circumstances."[2] The Superior Court denied the motion on June 25, 2002, noting that it had no discretion to reduce a mandatory minimum sentence.

On November 12, 2002, Hartmann filed another motion, entitled "Motion to Dismiss."[3] In this motion, Hartmann challenged the jurisdiction of the Superior Court over the charges in his indictment and alleged that his counsel had been ineffective. On November 19, 2002, the Superior Court struck the motion, noting that a motion to dismiss was improper because Hartmann's convictions were final. On March 20, 2003, the Delaware Supreme Court affirmed this order, explaining that the Superior Court did not abuse its discretion in striking the motion as a nonconforming document "to the extent that" the motion did not comply with Rule 61. The Supreme Court also determined that Hartmann's substantive argument was meritless.

On August 4, 2003, Hartmann filed a habeas

---

fine, or reduce the fine or term or conditions of partial confinement or probation, at any time. A motion for reduction of sentence will be considered without presentation, hearing or argument unless otherwise ordered by the court.

[2] Hartmann filed a duplicate of this motion on July 26, 2001. The filing of this duplicate did not appear to affect the Superior Court's review and certainly did not change the dates during which the original motion was pending.

[3] Motions to dismiss are governed by Del. Super Ct. Crim. R. 12. Under Rule 12(b)(2), motions alleging defects in the indictment must be raised prior to trial, though motions alleging failures of jurisdiction or failures to charge a crime may be raised at any time during the pendency of the proceedings.

petition for federal collateral relief under 28 U.S.C. § 2254. The District Court dismissed the petition as time-barred under the one-year limitations period set forth in 28 U.S.C. § 2244(d)(1). The District Court found that Hartmann's conviction had become final on April 30, 2001, and that he did not file his § 2254 petition until August 4, 2003 – well over two years later. Although the application would have been timely had the limitations period been tolled both by the Rule 35(b) motion and by the "Motion to Dismiss," the District Court determined that Hartmann's "Motion to Dismiss" could not toll the limitations period because it was not a "properly filed" application for state post-conviction relief under § 2244(d)(2). Thus, the District Court found that the period from November 12, 2002, through March 20, 2003, should be counted as part of Hartmann's one-year allowance and that, as a result, Hartmann's § 2254 petition was untimely regardless of whether his Rule 35(b) motion tolled the limitations period. The District Court therefore declined to rule on the tolling effect of Hartmann's Rule 35(b) motion.

On November 1, 2005, a three-judge panel of our Court issued a certificate of appealability under 28 U.S.C. § 2253(c)(1) with regard to the District Court's ruling that Hartmann's § 2254 petition was time-barred. We requested briefing with respect to the applicability of statutory tolling on the Rule 35(b) motion and the "Motion to Dismiss."

II. Jurisdiction and Standard of Review

The District Court exercised jurisdiction over Hartmann's petition pursuant to 28 U.S.C. § 2254(a). We have jurisdiction of this appeal pursuant to 28 U.S.C. §§ 1291 and 2253. Our review of the timeliness of a federal habeas

application is plenary. *See Nara v. Frank*, 264 F.3d 310, 314 (3d Cir.2001).

III. Discussion

With the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress established a one-year limitations period within which a person in custody pursuant to the judgment of a state court may file an application in federal court for a writ of habeas corpus. 28 U.S.C. § 2244(d)(1).[4] Absent a state-created impediment to filing or the development of new constitutional rights or discoverable facts, none of which is present in this case, the limitations period runs from the date on which the state conviction "became final by the conclusion of direct review or the expiration of the time for seeking such review." § 2244(d)(1)(A).

---

[4] 28 U.S.C. § 2244(d)(1) provides, in full:

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitations period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Because Hartmann did not seek direct review of his sentence or his conviction, his conviction became final on the date on which his time for seeking direct review expired. In Delaware, a direct appeal of a criminal conviction must be filed within thirty days after the date of conviction. Del. Supr. Ct. R. 6(a)(iii). Hartmann was convicted on March 29, 2001, and his conviction became final on April 30, 2001.[5] Therefore, absent any tolling, Hartmann had until April 30, 2002, to file a federal habeas application that was timely under 28 U.S.C. § 2244(d)(1). Hartmann did not file his § 2254 petition until August 4, 2003.

In AEDPA, Congress also provided a statutory mechanism by which petitioners may toll the one-year limitations period prescribed in § 2244(d)(1). Under 28 U.S.C. § 2244(d)(2), "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." Hartmann claims that his limitations period was tolled under § 2244(d)(2) during two periods of time: first, during the pendency of his Rule 35(b) motion, from June 29, 2001, through June 25, 2002; and second, during the pendency of his "Motion to Dismiss," from November 12, 2002, through March 20, 2003. For Hartmann's § 2254 petition to be timely under § 2244(d)(1), both motions must have had the effect of tolling the limitations period; the time gained

---

[5] The date thirty days after his conviction fell on a Saturday, and so the conviction became final on the following Monday pursuant to Del. Supr. Ct. R. 11(a).

from either one, without the other, is insufficient.[6]

We look first to the Rule 35(b) motion. The question we address is whether Hartmann, by filing a motion under Delaware Superior Court Criminal Rule 35(b), filed an "application for State post-conviction or other collateral review with respect to the pertinent judgment or claim" capable of tolling the one-year limitations period for filing a federal habeas application. To answer this question, we first must understand what Hartmann was requesting when he filed for relief under Rule 35(b). Unlike Delaware Superior Court Criminal Rule 35(a), which allows a court to "correct an illegal sentence," and Rule 61, which governs the procedures by which a person can challenge a judgment on the ground that "the court lacked jurisdiction or on any other ground that is a sufficient factual and legal basis for a collateral attack," Rule 35(b) "allows for a reduction of sentence *without regard to the existence of a legal defect*." *State v. Lewis*, 797 A.2d 1198, 1201 (Del.2002) (emphasis added). A Rule 35(b) motion is a plea for leniency, directed toward the sentencing court, which seeks discretionary relief based on mercy and grace, rather than on the law. A prisoner may make such a motion only once and, except in extraordinary circumstances, must file the motion within 90 days of the date on which the sentence was imposed or forfeit the right to do so. If the 90-day deadline is read together with the 30-day deadline for filing a direct appeal, most prisoners who file a Rule 35(b) motion will do so

---

[6] This appeal is limited to the issue of statutory tolling, and consequently, we do not address the question of equitable tolling, which the District Court considered and resolved in favor of Appellees.

during the pendency of the direct appeal.[7] Importantly, a prisoner is not obligated to seek relief under Rule 35(b); Delaware's direct and collateral appellate review mechanisms operate independently of the Rule 35(b) procedures by which a prisoner may seek discretionary leniency.[8]

Thus, we are presented with the question: Does a properly filed plea for leniency, by which the prisoner seeks discretionary mercy and does not challenge the lawfulness of the sentence, toll the one-year limitations period for filing federal habeas application? In approaching this question, we are reminded that our Court has taken a "flexible approach" toward interpreting § 2244(d)(2). *See Nara*, 264 F.3d at 315. Flexibility, however, is not without limits; the application of a flexible

---

[7] Indeed, Rule 35(b) expressly provides that the sentencing court has discretion either to decide the motion or to defer decision while the appeal is pending.

[8] It is possible that a prisoner might file what is ostensibly a motion under Rule 35(b) and yet intend to seek relief other than discretionary leniency. We note this possibility because we bear in mind that *pro se* filings are to be construed liberally. *See Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972); *Holley v. Dep't of Veteran Affairs*, 165 F.3d 244, 247 (3d Cir.1999). Nonetheless, construing Hartmann's motion liberally, we find that it is a pure plea for leniency in which Hartmann does not challenge the legality of his conviction or sentence. It is true that in seeking mercy, Hartmann referred to several bumps in the road toward his conviction and sentencing, including his confusion during the proceedings and his miscommunications with his attorney. He recited these facts, however, not to challenge the lawfulness of the proceedings, but to better establish his sympathetic character. Hartmann's motion was written to persuade the Superior Court of his remorse, his history as a family man and productive member of the community, and the unlikeliness that he would repeat his offense. The Delaware courts interpreted Hartmann's Rule 35(b) motion as a pure plea for leniency, and so shall we.

approach requires recognition of the limits past which the rule in question will not bend.

Nara involved a state court prisoner who had collaterally challenged his mental competence to enter a guilty plea but who had withdrawn his challenge after being informed that he had already litigated the issue in an earlier collateral proceeding. He then filed a motion to withdraw his guilty plea *nunc pro tunc*. *Id.* at 313. In a habeas proceeding before us, we held that, under our "flexible approach," Nara's motion was "certainly akin to an application for state post-conviction or other collateral review." *Id.* at 316. Our decision was informed by the full consideration given to the motion by the state court. *Id.* Even though Nara's motion to withdraw the guilty plea was substantially similar to the earlier petition, we concluded that we would toll the § 2244(d)(1) limitations period during the pendency of the motion because the motion attacked the lawfulness of the prisoner's conviction in a procedure designed to allow post-conviction review of a previously litigated issue; thus, we deemed the motion to be properly filed under state law.

Here, however, we have a state court proceeding that is not attacking the lawfulness of the conviction or of the sentence. The motion here is for a discretionary exercise of leniency by the sentencing judge-leniency despite a conviction and a sentence which are not claimed to be invalid.

We are aware of three other federal courts of appeals that have considered this question. Their opinions are discordant. The Fourth Circuit has held that a motion for reduction of sentence under West Virginia Rule of Criminal Procedure 35(b) is not an "application for State post-conviction or

other collateral review" capable of tolling the limitations period under 28 U.S.C. § 2244(d)(2). *Walkowiak v. Haines,* 272 F.3d 234, 239 (4th Cir. 2001). The Fourth Circuit reasoned that a motion for reduction of sentence on grounds of leniency cannot qualify as seeking review collateral to the original proceeding because (1) the review procedures are not "separate and distinct" from the original and (2) the prisoner does not allege that any legally cognizable error was committed. *See Walkowiak,* 272 F.3d at 237-38. We agree with the Fourth Circuit that for an application to be for "post-conviction or other collateral review," the applicant must seek review that is collateral to the original judgment.

Similarly, the Eleventh Circuit has held that a prisoner does not toll the limitations period pursuant to § 2244(d)(2) by requesting review of his or her sentence pursuant to section 17-10-6 of the Georgia Code, which provides for review by a three-judge panel to determine whether the sentence imposed was "excessively harsh." *Bridges v. Johnson,* 284 F.3d 1201, 1203-04 (11th Cir.2002). The court concluded that a judicial review procedure for determining whether a sentence is excessively harsh does not toll the limitations period of § 2244(d)(1) "because it does not promote exhaustion by giving state courts the opportunity to consider federal-law challenges to state court judgments, and it does not promote finality of state court judgments by reducing the time in which federal review is sought." *Bridges,* 284 F.3d at 1203.

The Tenth Circuit, however, has determined that the limitations period *is* tolled pursuant to § 2244(d)(2) by a motion for reduction of sentence under Colorado Rule of Criminal Procedure 35(b),

Robinson v. Golder, 443 F.3d 718, 720-21 (10th Cir.2006), and by a motion for modification of sentence under New Mexico Rule of Criminal Procedure 5-801(B). *Howard v. Ulibarri*, 457 F.3d 1146, 1149-50 (10th Cir.2006). The Tenth Circuit based its decisions on comity because the state court had retained jurisdiction of the leniency proceeding during its pendency. We note, however, that the language of § 2244(d)(2) specifies that the section is tolled only by "state post-conviction or other collateral review" – not by just any pending state court proceeding. For that reason, we are not persuaded by the reasoning of the Tenth Circuit.

Moreover, Congress, in enacting AEDPA, intended to further principles of comity, finality, and federalism, which are promoted in large part through the requirement, set forth in 28 U.S.C. § 2254(b), that state remedies be exhausted before seeking federal review. *Duncan v. Walker*, 533 U.S. 167, 178, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001); *Williams v. Taylor*, 529 U.S. 420, 436, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000). As such, the Supreme Court repeatedly has explained that courts are to evaluate the tolling rules of 28 U.S.C. § 2244(d) together with the exhaustion requirement. Specifically, we are instructed to seek a construction of § 2244(d)(2) which "promotes the exhaustion of state remedies while respecting the interest in the finality of state court judgments." *Duncan*, 533 U.S. at 178, 121 S.Ct. 2120. The exhaustion requirement, in turn, "ensures that the state courts have the opportunity fully to consider federal-law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon that judgment." *Id.* at 178-79, 121 S.Ct. 2120. Obviously, when a prisoner in state custody opts to file a motion for discretionary leniency, the state is not being asked

to correct errors of legal moment. Whatever interest the state has in deciding the motion, its interest is not one in correcting errors before the federal courts assume jurisdiction.

This understanding is confirmed by the Supreme Court's recent pronouncement that "AEDPA's exhaustion provision and tolling provision work together." *Lawrence v. Florida*, --- U.S. ----, 127 S.Ct. 1079, 1083, 166 L.Ed.2d 924 (2007). Where the goals of exhaustion end, the need for tolling recedes. Moreover, were we to hold that the optional Delaware Rule 35(b) motion has the effect of tolling the limitations period of § 2244(d)(1), we might create an incentive for prisoners to file frivolous requests for leniency merely as a delay tactic. *Cf. id.* at 1085. Finally, even though AEDPA's tolling provisions may embrace goals other than exhaustion, such as comity and the desire to avoid simultaneous litigation, tolling for a leniency petition does not advance those goals. Accordingly, we conclude that a motion for sentence reduction properly filed pursuant to Delaware Superior Court Criminal Rule 35(b) does not have the effect of tolling the limitations period set forth in 28 U.S.C. § 2244(d)(1). During the pendency of Hartmann's Rule 35(b) motion, the statutory limitations clock of § 2244(d)(1) continued to run, rendering his federal habeas application untimely.[9]

---

[9] Because Hartmann's Rule 35(b) motion did not toll the limitations period pursuant to 28 U.S.C. § 2244(d)(2), his federal habeas application was untimely regardless of whether his "Motion to Dismiss" had the effect of tolling the limitations period. We therefore decline to consider whether Hartmann's "Motion to Dismiss" was improperly filed or to decide what effect to give to the language of the Delaware Supreme Court when it stated that the Superior Court did

IV. Conclusion

For the foregoing reasons, we will affirm the judgment of the District Court, dismissing as untimely Hartmann's application for a writ of habeas corpus under 28 U.S.C. § 2254.

---

not abuse its discretion "to the extent that" Hartmann's "Motion to Dismiss" did not comply with Rule 61.

Appendix B

DETLEF F. HARTMANN, Petitioner, Civil Action No. 03-796-JJF

v.

THOMAS CARROLL, Warden, Respondent.

MEMORANDUM OPINION

November 16, 2004
Wilmington, Delaware

Farnan, District Judge

I. INTRODUCTION

Petitioner Detlef F. Hartmann is a Delaware inmate in custody at the Delaware Correctional Center in Smyrna, Delaware. Currently before the Court is Petitioner's Petition For A Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (D.I. 2; D.I. 12.) For the reasons discussed, the Court concludes that Petitioner's habeas petition is time-barred by the one-year period of limitations prescribed in 28 U.S.C. § 2244(d)(1).

II. BACKGROUND

In December 1999, Petitioner was indicted on multiple counts of unlawful sexual intercourse, unlawful sexual contact, and possession of child pornography. In March 2001, Petitioner pled guilty in the Delaware Superior Court to one count of second degree unlawful sexual intercourse (a lesser included offense of first degree unlawful sexual intercourse) and two counts of unlawful sexual contact. The victim was his daughter. *Hartmann v. State*, 818 A.2d 970 (Del. 2003). Petitioner was immediately sentenced to an aggregate of nineteen years incarceration, suspended after ten mandatory years for decreasing levels of supervision. (D.I. 23, Del. Super. Ct. Dkt. Item 49.) He did not appeal his conviction or sentence.

In June and July 2001, Petitioner filed two *pro se* motions for reduction of sentence in the Delaware Superior Court. (D.I. 23, Del. Super. Ct. Dkt. Items 53, 56.) The Superior Court denied the motions in June 2002. In November 2002, Petitioner filed a motion in the Superior Court titled "Motion to Dismiss," contending that the Superior Court did not have jurisdiction over the charges in the indictment and that his counsel had been ineffective for failing to address this alleged defect. The Superior Court struck the motion as a nonconforming document, and the Delaware Supreme Court affirmed the decision. *Hartmann*, 818 A.2d at 970.

In August 2003, Petitioner, acting *pro se*, filed the pending application for federal habeas relief. (D.I. 2; D.I. 12.) Petitioner contends: (1) the trial court lacked jurisdiction to convict him because the charges should have been brought in Family Court, not the Superior Court; (2) his

defense counsel was ineffective because he did not investigate, file a motion to dismiss, or inform Petitioner that the trial court lacked jurisdiction; (3) the prosecution improperly charged him in the wrong court; (4) his plea was involuntary due to his counsel's failure to inform him of the jurisdictional problem; and (5) the conditions of his confinement are too restrictive with respect to his access to the legal materials and the internet.[1] (D.I. 2 at 5A-5D; D.I. 12.)

Respondent asks the Court to dismiss the petition as time-barred. (D.I. 38.) In the alternative, Respondent contends that the petition is a mixed petition that should be dismissed unless Petitioner voluntarily withdraws the unexhausted ineffective assistance of counsel claim. *Id.*

III. DISCUSSION

A. One-Year Statute of Limitations

Petitioner's § 2254 petition is subject to requirements of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See generally Lindh v. Murphy*, 521 U.S. 320, 336, 138

---

[1] To the extent Petitioner's conditions claim is an independent claim, it is not properly asserted pursuant to 28 U.S.C. § 2254. Rather, it must be asserted under 42 U.S.C. § 1983. *See Preiser v. Rodriguez*, 411 U.S. 475, 498-99, 36 L. Ed. 2d 439, 93 S. Ct. 1827 & n. 14 (1973) (a § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life"); *Leamer v. Fauver*, 288 F.3d 532, 540-44 (3d Cir. 2002) (an inmate's challenge that "does not necessarily imply the invalidity of [his] conviction or continuing confinement . . . is properly brought under § 1983"). However, to the extent Petitioner complains about the conditions as an additional argument for tolling the limitations period, the Court discusses his claim *infra* at 9-10.

L. Ed. 2d 481, 117 S. Ct. 2059 (1997) (holding AEDPA applies to "such cases as were filed after the statute's enactment"); *Lawrie v. Snyder*, 9 F. Supp. 2d 428, 433 n.1 (D. Del 1998). AEDPA prescribes a one-year period of limitations for the filing of habeas petitions by state prisoners, which begins to run from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

Petitioner does not allege, nor can the Court discern, any facts triggering the application of § 2244(d)(1)(B), (C), or (D). As such, the one-year period of limitations began to run when Petitioner's conviction became final under § 2244(d)(1)(A).

Pursuant to § 2244(d)(1)(A), when a state prisoner appeals a state court judgment, the state

court criminal judgment becomes "final," and the statute of limitations begins to run, "at the conclusion of review in the United States Supreme Court or when the [90-day] time [period] for seeking certiorari review expires." *See Kapral v. United States*, 166 F.3d 565, 575, 578 (3d Cir. 1999); *Jones v. Morton*, 195 F.3d 153, 158 (3d Cir. 1999). However, if a petitioner does not appeal a state court judgment, then the conviction becomes final on the "date on which the time for filing such an appeal expired." *See Kapral*, 166 F.3d at 577.

In this case, the Delaware Superior Court sentenced Petitioner on March 29, 2001. (D.I. 23, Del. Super. Ct. Dkt. PK99120515 Item 49.) He did not appeal. Delaware law requires a timely notice of appeal in a direct criminal appeal to be filed within thirty days after a sentence is imposed. *See* 10 Del. Code Ann. § 147; Del. Supr. Ct. R. 6(a)(ii). Consequently, Petitioner's conviction became final for the purposes of § 2244(d)(1)(A) on April 30, 2001.[2] Thus, to timely file a habeas petition with this court, Petitioner needed to file his § 2254 petition no later than April 30, 2002.

A *pro se* prisoner's habeas petition is deemed filed on the date it is delivered to prison officials for mailing to the district court. *See Longenette v. Krusing*, 322 F.3d 758, 761 (3d Cir. 2003); *Burns v. Morton*, 134 F.3d 109, 113 (3d Cir. 1998); *Woods v. Kearney*, 215 F. Supp. 2d 458, 460 (D. Del. 2002).

---

[2] Pursuant to Del. Supr. Ct. R. 11(a), when computing any period of time prescribed by the rules, if the last day of the period falls on a holiday, Saturday, or Sunday, the period "shall run until the end of the next day on which the office of the Clerk is open." Here, the 30-day appeal period expired on Saturday, April 28, 2001. Thus, the time to appeal was extended through the end of the day on Monday, April 30, 2001.

Petitioner's habeas application is dated August 4, 2003, and presumably, he could not have delivered it to prison officials for mailing any earlier than that date. *See, e.g., Gholdson v. Snyder*, 2001 U.S. Dist. LEXIS 8867, 2001 WL 657722, at *2 n.1 (D. Del. May 9, 2001). Consequently, the Court finds that August 4, 2003 is the filing date, which is well past the April 2002 filing deadline. Thus, unless the limitations period can be statutorily or equitably tolled, Petitioner's habeas petition is time-barred. *See Jones v. Morton*, 195 F.3d 153, 158 (3d Cir. 1999). The Court will discuss each doctrine.

B. Statutory Tolling

AEDPA specifically permits the statutory tolling of the one-year period of limitations:

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending should not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(2). The Third Circuit views a properly filed application for state post-conviction review as "one submitted according to the state's procedural requirements, such as the rules governing the time and place of filing." *Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir. 1998). Procedural requirements include "the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee." *Artuz v. Bennett*, 531 U.S. 4, 8, 148 L. Ed. 2d 213, 121 S. Ct. 361 (2000). However, a properly filed state post-conviction motion will only toll the federal habeas limitations period if the

post-conviction motion itself is filed within the federal one-year limitations period. *See Price v. Taylor*, 2002 U.S. Dist. LEXIS 17911, 2002 WL 31107363, at *2 (D. Del. Sept. 23, 2002).

Here, Petitioner filed two Motions for Reduction of Sentence in the Delaware Superior Court: one on June 29, 2001 and one on July 26, 2001. Respondent contends that these Motions "arguably did not trigger the tolling mechanism of § 2244(d)(2)," and supports this statement by citing to *Walkowiak v. Haines*, 272 F.3d 234, 237-38 (4th Cir. 2001). However, the Court need not determine this issue because the Petition is time-barred even if the Rule 35 Motions trigger the statutory tolling doctrine of § 2244(d)(2). For example, when Petitioner filed his first Rule 35 Motion on June 29, 2001, 59 days of the filing period had already expired. The Superior Court denied this Motion, together with the second Rule 35 Motion, on June 25, 2002. As such, if § 2244(d)(2) applies, then the Rule 35 Motions tolled the limitations period from June 29, 2001 through July 26, 2002 (the expiration date for filing a notice of appeal regarding this denial). When the limitations period started again on July 27, 2002, only 306 days remained in the one-year filing period. Consequently, Petitioner had to file his federal habeas Petition by May 29, 2003 to be timely. Petitioner's filing on August 4, 2003 was too late.

Further, Petitioner's Motion to Dismiss does not toll the limitations period because it does not constitute a "properly filed" application for state post-conviction relief. 28 U.S.C. § 2244 (d)(2). Petitioner filed his Motion to Dismiss in the Delaware Superior Court on November 12, 2002, but the Superior Court struck the document as nonconforming because it was not filed pursuant to

Delaware Superior Court Criminal Rule 61.[3] *See Hartmann*, 818 A.2d at 970. The Delaware Supreme Court affirmed this dismissal.[4] *Id.* Consequently, the Motion to Dismiss does not trigger the statutory tolling provision of § 2244(d)(2).

In short, statutory tolling does not render Petitioner's § 2254 petition timely.

C. Equitable Tolling

A court, in its discretion, may equitably toll the one-year filing period when "the petitioner has in some extraordinary way . . . been prevented from asserting his or her rights." *Miller v. New Jersey State Dep't of Corrs.*, 145 F.3d 616 (3d Cir. 1998) (internal citations omitted). In general, federal courts invoke the doctrine of equitable tolling "only sparingly." *See United States v. Midgley*, 142 F.3d 174, 179 (3d Cir. 1998). The Third Circuit permits equitable tolling for habeas petitions in three circumstances:

> (1) where the defendant actively misled the plaintiff;

---

[3] If the Motion to Dismiss does not toll the limitations period, then, by extension, Petitioner's Motions to Reconsider the Superior Court's decisions to strike his Motion to Dismiss do not toll the limitations period. *See Douglas v. Horn*, 359 F.3d 257, 262 (3d Cir. 2004).

[4] The Delaware Supreme Court also denied Petitioner's Motion to Dismiss as meritless. This alternative holding does not negate the Superior Court's procedural determination that the motion should be struck as nonconforming. *See, e.g., Hubbard v. Pinchak*, 378 F.3d 333, 339 n.3 (3d Cir. 2004) (a federal court cannot avoid state court's procedural ruling due to the state court's alternative ruling on the merits).

> (2) where the plaintiff was in some extraordinary way prevented from asserting his rights; or
>
> (3) where the plaintiff timely asserted his rights mistakenly in the wrong forum.*Jones v. Morton*, 195 F.3d 153, 159 (3d Cir. 1999).

Generally, "a statute of limitations should be tolled only in the rare situation where equitable tolling is demanded by sound legal principles as well as the interests of justice." *Id.* (quoting *Midgley*, 142 F.3d at 179). In order to trigger equitable tolling, the petitioner must demonstrate that he "exercised reasonable diligence in investigating and bringing [the] claims"; mere excusable neglect is insufficient. *Miller*, 145 F.3d at 618-19 (citations omitted).

Petitioner's "Preliminary Reply" to Respondent's Answer contends that he has diligently pursued his claims. He also asserts several "extraordinary circumstances" requiring the equitable tolling of the limitations period: (1) his access to the law library and the internet was restricted and he did not have sufficient "time to read, comprehend and apply his rights"; (2) he is not educated or knowledgeable in the area of law; (3) it took him five months to discover his attorney's "misconduct and nonfeasance" in failing to file a direct appeal; and (4) his is "actually innocent" of the charges. (D.I. 26 at 2-3, 9.) The Court will discuss each "extraordinary circumstance" in turn.

Despite Petitioner's assertion, limited access to the law library and the internet do not necessarily warrant equitable tolling of the limitations period. *See Garrick v. Vaughn*, 2003

U.S. Dist. LEXIS 26203, 2003 WL 22331774, at *4 (E.D. Pa. Sept. 5, 2003) ("routine aspects of prison life such as lockdowns, lack of access to legal resources, and disturbances . . . 'do not constitute extraordinary circumstances'") (internal citation omitted); *Perry v. Vaughn*, 2003 U.S. Dist. LEXIS 24094, 2003 WL 22391236, at *4 (E.D. Pa. Oct. 17, 2003); *see also Holman v. Sobina*, 2004 U.S. Dist. LEXIS 10073, 2004 WL 1196651, at *3 (E.D. Pa. May 28, 2004) ("inadequacy of prison legal materials is not the kind of extraordinary circumstance that would warrant equitable tolling"). Here, Petitioner has not demonstrated how the alleged restricted access prevented him from timely filing his federal habeas petition. Indeed, the form habeas petition filed by Petitioner specifically instructs him to state each ground "briefly without citing cases or law." Further, after the Delaware Supreme Court affirmed the Superior Court's decision regarding Petitioner's Motion to Dismiss, Petitioner still had two months remaining in the limitations period, "time enough for [him], acting with reasonable diligence, to prepare and file at least a basic *pro se* habeas petition." *Brown v. Shannon*, 322 F.3d 768, 774 (3d Cir. 2003). Thus, the alleged limited library and internet access did not prevent Petitioner from filing his habeas petition.

As for Petitioner's ignorance of the law, the Court has held that a lack of legal knowledge does not constitute an extraordinary circumstance warranting equitable tolling. *See Williams v. Taylor*, 2002 U.S. Dist. LEXIS 12584, Civ. Act. No. 02-18-JJF, 2002 WL 1459530, at *3 (D. Del. July 3, 2002).

Likewise, the failure of defense counsel to file a direct appeal and his alleged failure to inform

Petitioner about AEDPA's limitations period do not warrant equitable tolling. The Third Circuit adheres to the principle that, in non-capital cases, and absent attorney deception or death, "attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling." *Fahy v. Horn*, 240 F.3d 239, 244 (3d Cir. 2001). If, however, an attorney affirmatively misrepresents that he will file a complaint, equitable tolling is warranted, provided that the petitioner demonstrates extreme diligence in pursuing his claim and the defendant will not be prejudiced. *Schlueter v. Varner*, 384 F.3d 69, 76-7 (3d Cir. 2004) (citing *Seitzinger v. Reading Hosp. & Med. Ctr.*, 165 F.3d 236, 242 (3d Cir. 1999)).

Petitioner has not alleged that he discussed his intention to appeal with his attorney, nor has he alleged that his attorney misled him into believing that he had filed an appeal on Petitioner's behalf. Also, Petitioner has failed to demonstrate how the failure of his counsel to file an appeal affected his ability to timely file a federal habeas petition. Further, because prisoners do not have a constitutional right to counsel when "mounting collateral attacks on their convictions," *Pennsylvania v. Finley*, 481 U.S. 551, 556, 95 L. Ed. 2d 539, 107 S. Ct. 1990 (1990), the "failure" of defense counsel to inform Petitioner of AEDPA's limitations period is not an extraordinary circumstance. *See, e.g., Johnson v. Hendricks*, 314 F.3d 159, 163 (3d Cir. 2002) ("an attorney's mistake in determining the date a habeas petition is due" does not constitute an extraordinary circumstance for purposes of equitable tolling).

Finally, Petitioner appears to assert his actual innocence as a reason for equitably tolling

the one-year limitations period. (D.I. 26 at 9.) However, neither the Third Circuit, nor the United States Supreme Court, has addressed whether a petitioner's "actual innocence" qualifies as an exception to AEDPA's statute of limitations. *Morales v. Carroll*, 2004 U.S. Dist. LEXIS 7671, 2004 WL 1043723, at *3 (D. Del. Apr. 28, 2004); *Devine v. Diguglielmo*, 2004 U.S. Dist. LEXIS 8456, 2004 WL 945156, at *3 & n.4 (E.D. Pa. Apr. 30, 2004) (collecting cases). Even if such an exception does exist, Petitioner's conclusory statements do not persuade the Court that he is actually innocent. *See Morales*, 2004 U.S. Dist. LEXIS 7671, 2004 WL 1043723, at *3 (discussing how a petitioner proves actual innocence); *Stocker v. Warden*, 2004 U.S. Dist. LEXIS 5395, 2004 WL 603400, at**13-16 (E.D. Pa. Mar. 25, 2004) (determining that AEDPA's limitations should be equitably tolled under the circumstances of that case because petitioner's actual innocence was undisputed). Accordingly, the Court concludes that the doctrine of equitable tolling is not available to Petitioner on the facts he has presented. Petitioner's § 2254 Petition will be dismissed as untimely.[5]

---

[5] Respondent alternatively argues that, unless Petitioner voluntarily withdraws his unexhausted ineffective assistance of counsel claim, the Court should dismiss the Petition as mixed. Respondent then contends that even if the unexhausted claim is withdrawn, the remaining claims in the Petition should be dismissed as procedurally barred due to Petitioner's procedural default at the state level and because one claim is not cognizable on federal habeas review. However, the Court's conclusion that the Petition is time-barred obviates the need to discuss these alternate grounds for dismissal because "'the statute of limitations . . . and the exhaustion doctrine . . . impose entirely distinct requirements on habeas petitioners; both must be satisfied before a federal court may consider the merits of a petition.'" *Sweger v. Chesney*, 294 F.3d 506, 518-19 (3d Cir. 2002) (citing *Tillema v. Long*, 253 F.3d 494 (9th Cir. 2001)). In sum, even if

D. Pending Motions

Petitioner has filed the following motions: (1) Motion for Summary Judgment (D.I. 27.); (2) Motion to Stay Case (D.I. 28.); (3) Motion for Leave to File Oversized Brief (D.I. 29.); (4) Motion for Temporary Injunction[6] (D.I. 39.); and (5) Motion for Reconsideration of this Court's Order dismissing Petitioner's Motion for Brief Date.[7] (D.I. 43.) Because the Court has concluded that it must dismiss Petitioner's § 2254 petition as time-barred, the Court will deny these Motions as moot.

IV. CERTIFICATE OF APPEALABILITY

Finally, the Court must decide whether to issue a certificate of appealabilty. *See* Third Circuit Local Appellate Rule 22.2. A certificate of appealability may only be issued when a petitioner makes a "substantial showing of the denial of a constitutional right" by demonstrating "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 28 U.S.C. § 2253(c)(2); *Slack v.*

Petitioner did withdraw the ineffective assistance of counsel claim or exhaust state remedies for the claim, it would not change the fact that his Petition was already time-barred when he filed it in this Court.

[6] Petitioner titled this document "Addendum to Habeas Corpus and Civil Rights Action." However, he included language regarding the "emergency nature" of his case and "imminent danger," thereby causing the document to be construed on the docket as a Motion for Temporary Injunction. However, the contents of this addendum clearly demonstrate that Petitioner is merely attempting to add claims to or further support his pending Petition, not move for a temporary injunction.

[7] Petitioner never served Respondent with his Motion for Summary Judgment, his Motion to Stay Case, or his Motion to file Oversized Brief.

McDaniel, 529 U.S. 473, 484, 146 L. Ed. 2d 542, 120 S. Ct. 1595 (2000).

When a federal court denies a habeas petition on procedural grounds without reaching the underlying constitutional claims, the court is not required to issue a certificate of appealability unless the petitioner demonstrates that jurists of reason would find it debatable: (1) whether the petition states a valid claim of the denial of a constitutional right; and (2) whether the court was correct in its procedural ruling. *Id.* "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Id.*

The Court concludes that Petitioner's habeas Petition must be dismissed as untimely. Reasonable jurists would not find this conclusion to be unreasonable, and therefore, the Court declines to issue a certificate of appealability.

V. CONCLUSION

Petitioner's Petition For A Writ Of Habeas Corpus Pursuant To 28 U.S.C. § 2254 will be denied. An appropriate Order will be entered.

ORDER

At Wilmington, this 16th day of November, 2004, consistent with the Memorandum Opinion issued this same day;

IT IS HEREBY ORDERED that:

1. Petitioner Detlef F. Hartmann's Petition For A Writ Of Habeas Corpus Pursuant To 28 U.S.C. § 2254 is DISMISSED, and the relief requested therein is DENIED. (D.I. 2; D.I. 12.)

2. The following Motions are DISMISSED as MOOT:

(1) Motion for Summary Judgment (D.I. 27.);

(2) Motion to Stay Case (D.I. 28.);

(3) Motion for Leave to File Oversized Brief (D.I. 29.);

(4) Motion for Temporary Injunction (D.I. 39.); and

(5) Motion for Reconsideration of this Court's Order dismissing Petitioner's Motion for Brief Date.

3. The Court declines to issue a certificate of appealability for failure to satisfy the standard set forth in 28 U.S.C. § 2253(c)(2).

/s/
JOSEPH J. FARNAN, JR.

Appendix C

28 U.S.C. § 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless -

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and

convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Appendix D

Delaware Superior Court Criminal Rule 35(b)

Reduction of Sentence. The court may reduce a sentence of imprisonment on a motion made within 90 days after the sentence is imposed. This period shall not be interrupted or extended by an appeal, except that a motion may be made within 90 days of the imposition of sentence after remand for a new trial or for resentencing. The court may decide the motion or defer decision while an appeal is pending. The court will consider an application made more than 90 days after the imposition of sentence only in extraordinary circumstances or pursuant to 11 Del. C. § 4217. The court will not consider repetitive requests for reduction of sentence. The court may suspend the costs or fine, or reduce the fine or term or conditions of partial confinement or probation, at any time. A motion for reduction of sentence will be considered without presentation, hearing or argument unless otherwise ordered by the court.

76

(2)

FILED
DEC 10 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-478

IN THE

Supreme Court of the United States

DETLEF F. HARTMANN,
Petitioner,

vs.

ELIZABETH BURRIS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Of counsel:
DONALD B. AYER
SAMUEL ESTREICHER
MEIR FEDER
NYU LAW SCHOOL
SUPREME COURT
CLINIC
40 Washington Sq. South
New York, NY 10012
(212) 998-6226

DAVID R. FINE
(Counsel of Record)
CHRISTOPHER R. NESTOR
KIRKPATRICK &
LOCKHART PRESTON
GATES ELLIS LLP
17 North Second St.
18th Floor
Harrisburg, PA 17101
(717) 231-4500

Counsel for Petitioner
Detlef F. Hartmann

TABLE OF CONTENTS

Page

Argument in Reply 1

Conclusion 6

TABLE OF AUTHORITIES

Page

CASES

Artuz v. *Bennett*, 531 U.S. 4 (2000) 4

Clemens v. *Sutter*, 230 Fed. Appx. 832 (CA10 Cir. 2007) 2

Heinken v. *Higgens*, 172 Fed. Appx. 986 (CA10 2006) 2

Howard v. *Ulibarri*, 457 F.3d 1146 (CA10 2006) 2

Robinson v. *Golder*, 443 F.3d 718 (CA10 2006) 2

Thompson v. *Keohane*, 516 U.S. 99 (1995) 3

TMJ Implants, Inc. v. *Aetna, Inc.*, 498 F.3d 1175, 1189 (CA10 2007) 2

United States v. *Addonizio*, 442 U.S. 178 (1979) 5, 6

Walkowiak v. *Haines*, 272 F.3d 234 (CA4 2001) 3

Williams v. *Beck*, 115 Fed. Appx. 32 (CA10 2004) 2

FEDERAL STATUTES

28 U.S.C. § 2244(d)(2) 1, 4

MISCELLANEOUS

Roger A. Hanson and Henry W.K. Daley, U.S. Dep't of Justice, Bureau of Justice Statistics, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions* 11 (September 1995) 5

ARGUMENT IN REPLY

The petition showed that the decision below expands a clear conflict in the circuits about whether a motion for discretionary reduction of a sentence is an "application for State post-conviction or other collateral relief" and thus tolls the AEDPA's one-year period of limitations to file a federal *habeas* petition under 28 U.S.C. § 2244(d)(2). Respondent concedes this: "The Tenth Circuit . . . has decided that motions for reduction of sentence do trigger [this] tolling provision," while three other courts of appeals have now held that "a motion for reduction or modification of sentence does not trigger the tolling provision of § 2244(d)(2)." Opposition at 7, 10.

The petition also showed that this clear conflict, coupled with the unresolved state of the law in the other seven circuits, creates an intolerable level of uncertainty in the administration of post-conviction remedies. This uncertainty effectively requires hundreds of state prisoners to pursue simultaneous state and federal proceedings to avoid waiving either. Respondent does not even mention these consequences. And while Respondent devotes all but a single paragraph of her argument to the merits, she fails to raise any serious reason to doubt that the decision below is incorrect.

1. While Respondent does not dispute the existence of a direct conflict over the tolling effect of a motion to reduce a sentence, she nonetheless suggests that "the position of the Tenth Circuit is less clearcut than portrayed by petitioner." Opposition at 10. The decisions she cites, but does not discuss, offer no support for that claim.

All of the decisions Respondent cites are unpublished and thus do not constitute legal precedent under Tenth Circuit rules. 10th Cir. R. App. P. 32.1(A) ("Unpublished decisions are not precedential"); *see, e.g., TMJ Implants, Inc.* v. *Aetna, Inc.*, 498 F.3d 1175, 1189 (CA10 2007) ("this circuit uses the adjective *unpublished* to refer to opinions with no precedential force. . .") (emphasis original). Beyond the fact that none of the cited decisions have any precedential effect, two of them involve off-hand statements that are clearly *dicta*.[1] The remaining decision, *Heinken* v. *Higgens*, 172 Fed. Appx. 986 (CA10 2006), was decided without argument and released shortly after the Tenth Circuit's first precedential decision on this issue, *Robinson* v. *Golder*, 443 F.3d 718 (CA10 2006); *see* Docket, No. 06-6003 (CA10 2006), *available at* 2006 WL 979310.[2] Whatever the *Heinken* panel's awareness of the Tenth Circuit's own recently published precedential decision, it is clear that *Robinson*'s analysis was expressly reaffirmed in another published decision of the circuit issued a few months later, *Howard* v. *Ulibarri*, 457 F.3d 1146 (CA10 2006). Thus, there is no question about the authoritative position of the Tenth Circuit: a motion for discretionary reduction of sentence clearly tolls the limitations period.[3]

---

[1] *Clemens* v. *Sutter*, 230 Fed. Appx. 832, 834 n.1 (CA10 Cir. 2007) ("even if Clemens' § 982a petition did toll the limitations period for the single day it was pending, his § 2254 petition would still be untimely"); *Williams* v. *Beck*, 115 Fed. Appx. 32, 33 (CA10 2004) ("at most, the limitation period was tolled for eight days" where the deadline was missed by months).

[2] *Heinken* was released on April 14, 2006, and *Robinson* on March 30, 2006.

[3] It is important as well to note that the three unpublished opinions Respondent cites all relate to an Oklahoma statute. The two published – and precedential – opinions of the Tenth Circuit analyze procedural rules in

2. Respondent contends without analysis that "the conflict identified by petitioner does not warrant review at this time." Opposition at 7. Yet her opposition does not even address the problem of simultaneous state and federal proceedings that are the current, unavoidable result of the rule adopted by the court below. *See* Petition at 10-11. Nor does she mention the critical problem of uncertainty in the circuits that have yet to address the tolling effect of a motion to reduce a sentence. *See* Petition at 9. In seven circuits spanning 34 states, an inmate cannot know whether waiting to file a federal *habeas corpus* petition until after the state court's delayed completion of its sentence review will foreclose pursuit of federal *habeas*. Thus, state inmates not only in the Third, Fourth and Eleventh Circuits, but in all those circuits that have yet to address this issue, are well advised to assume that state sentence-review proceedings have no tolling effect and to file for federal *habeas* relief within a year, even if a state proceeding is still unresolved. Respondent's failure to address these problems of uncertainty and dual state-federal proceedings is inexplicable. This Court's decisions have long recognized an extraordinary federal interest in avoiding interference with state criminal proceedings and in just, uniform administration of *habeas corpus*. *See, e.g.*, *Thompson* v. *Keohane*, 516 U.S. 99, 106 (1995).

3. Respondent devotes the bulk of her argument to contending that the decision below was correct, based primarily on the fact that a Rule-35(b) motion may seek modification of the sentence as a matter of judicial discretion rather than as an attack based on a "legal flaw in the

---

Colorado and New Mexico that are particularly similar to the Delaware rule at issue in this case and the West Virginia rule at issue in *Walkowiak* v. *Haines*, 272 F.3d 234 (CA4 2001).

proceedings." Opposition at 7. Respondent claims on that account that such a motion cannot constitute "State post-conviction or other collateral review" within the meaning of 28 U.S.C. § 2244(d)(2), but why that should be true is left a complete mystery.

While there is no dispute that a Rule-35(b) motion seeks discretionary relief from the state court, Respondent offers neither reasoning nor authority for the claim that discretionary relief does not seek "State post-conviction or other collateral relief with respect to the relevant judgment or claim," 28 U.S.C. § 2244(d)(2). Clearly such a motion seeks *relief* – in the form of a reduced sentence – in a proceeding that follows final judgment on the conviction and is separate from – and thus *collateral* to – the principal criminal proceeding. Nowhere does Respondent even discuss the plain language of the statute, *see* Petition at 12-13, and the Court has repeatedly held that the language Congress used in the AEDPA controls. *See, e.g., Artuz* v. *Bennett,* 531 U.S. 4, 8-10 (2000).

Neither does Respondent address the fact that the decision below (like the decisions of the Fourth and Eleventh Circuits) is at odds with the principles of comity, finality and federalism. *See* Petition at 13-16. Indeed, Respondent concedes that a motion to reduce a sentence brought under Delaware Rule 35(b) poses no serious threat to the finality of state sentences because it must be brought within 90 days after the sentence becomes final.[4] Opposition at 6 n.1.

---

[4] Respondent does hint that finality could be disrupted because motions under Rule 35(b) challenging the conditions of probation or partial confinement can be brought at any time. Opposition at 6 n.1. But Respondent makes no effort to support her assertion. Obviously, "[m]ost prisoners filing

Respondent instead defends her position simply by citing the two circuits that concur with the position below and quoting cryptically from this Court's decision in *United States* v. *Addonizio*, 442 U.S. 178, 186 (1979). Opposition at 8. *Addonizio* has no relevance to the issue at hand. There, this Court considered whether 28 U.S.C. § 2255 authorized a district court to re-sentence a federal prisoner when the Parole Commission had exercised its statutory discretion in a way that did not honor "the subjective intent of the sentencing judge." 442 U.S. at 187. In holding that the judge had no such power, the Court noted that such a basis was not among those traditionally justifying *habeas* relief and simply restated this conclusion by noting that the claim for relief did not "meet any of the established standards of collateral attack." *Id.* at 186. Thus, the holding addressed the limits of the federal courts' Section-2255 authority to address a disagreement with the Parole Commission. It did not, even in 1979, provide an all-purpose definition of what was encompassed within the term "collateral attack." More obviously, the holding that re-sentencing could not be justified there tells us nothing at all about the meaning or outer limits of "post-conviction or other collateral relief" as those words were used in a statute enacted in 1996.

---

habeas corpus petitions in Federal court have been convicted of violent crimes by State trial courts and have been given a severe sentence." Roger A. Hanson and Henry W.K. Daley, U.S. Department of Justice, Bureau of Justice Statistics, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions* 11 (September 1995), *available at* http://www.ojp.gov/bjs/pub/pdf/fhcrcscc.pdf. And, because probationers and criminal defendants in half-way houses have generally received punishments at the low end of the options available to the court, there is no reason to expect that they would likely be filing large numbers of discretionary motions for sentence reduction.

Respondent's citation to *Addonizo*, coupled with her failure to support her position based on the text of the statute, its purposes or the principles of comity, finality and federalism, underscores the lack of legal foundation for the position of the court of appeals in this case.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

DAVID R. FINE
(Counsel of Record)
CHRISTOPHER R. NESTOR
KIRPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
17 North Second St., 18th Floor
Harrisburg, PA 17101
(717) 231-4500

Of counsel:
DONALD B. AYER
SAMUEL ESTREICHER
MEIR FEDER
NYU LAW SCHOOL
SUPREME COURT CLINIC
40 Washington Sq. South
New York, NY 10012
(212) 998-6226

Counsel for Petitioner
Detlef F. Hartmann

DECEMBER 2007

75

3

No. 07-478

FILED
NOV 30 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

DETLEF F. HARTMANN,

Petitioner,

v.

ELIZABETH BURRIS, Acting Warden,
Delaware Correctional Center,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF IN OPPOSITION

JOSEPH R. BIDEN, III
Attorney General of Delaware

LOREN C. MEYERS
Chief of Appeals Division
Counsel of Record

ELIZABETH R. MCFARLAN
Deputy Attorney General

DELAWARE DEPARTMENT OF JUSTICE
820 N. French St.
Wilmington, DE 19801
(302) 577-8500

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Table of Authorities ii

Opinions Below 1

Jurisdiction 1

Statement 1

Argument 6

Conclusion 11

TABLE OF AUTHORITIES

Page

CASES

Artuz v. Bennett, 531 U.S. 4 (2000) 7

Bridges v. Johnson, 284 F.3d 1201 (11th Cir. 2002) 6, 10

Carey v. Saffold, 536 U.S. 214 (2002) 7

Carter v. Litscher, 275 F.3d 663 (7th Cir. 2001) 9

Clemens v. Sutter, 230 Fed. Appx. 832 (10th Cir. 2007) 10

Cowherd v. Million, 380 F.3d 909 (6th Cir. 2004) 9

Dep't of Banking of Neb. v. Pink, 317 U.S. 264 (1942) 7

Evans v. Chavis, 546 U.S. 189 (2006) 1

Heinken v. Higgins, 175 Fed. Appx. 986 (10th Cir. 2006) 10

Howard v. Ulibarri, 457 F.3d 1146 (10th Cir. 2006) 6, 10

Huddleston v. Dwyer, 322 U.S. 23 (1944) 7

Lambrix v. Singletary, 520 U.S. 518 (1997) 7

Lawrence v. Florida, 127 S.Ct. 1079 (2007) 6

Moore v. Cain, 298 F.3d 361 (5th Cir. 2002) 9

Nara v. Frank, 264 F.3d 310 (3d Cir. 2001) 5

TABLE OF AUTHORITIES – Continued

Page

Poole v. United States, 250 F.2d 396 (D.C. Cir. 1957) 9

Richfield Oil Corp. v. State Bd. of Equalization, 329 U.S. 69 (1946) 7

Robinson v. Golder, 443 F.3d 718 (10th Cir. 2006) 6, 10

Sibley v. Culliver, 377 F.3d 1196 (11th Cir. 2004) 9

State v. Lewis, 797 A.2d 1198 (Del. 2002) 5, 8

Summers v. Schriro, 481 F.3d 710 (9th Cir. 2007) 7

Tillema v. Long, 253 F.3d 494 (9th Cir. 2001) 9

United States v. Addonizio, 442 U.S. 178 (1979) 8

United States v. Cumbie, 569 F.2d 273 (5th Cir. 1978) 8

United States v. Ellenbogen, 390 F.2d 537 (2d Cir.), *cert. denied*, 393 U.S. 918 (1968) 8

United States v. Maynard, 485 F.2d 247 (9th Cir. 1973) 8

United States v. Sobell, 314 F.2d 314 (2d Cir.), *cert. denied*, 374 U.S. 857 (1963) 8

Voravongsa v. Wall, 349 F.3d 1 (1st Cir. 2003), *cert. denied*, 541 U.S. 963 (2004) 7, 9

Walkowiak v. Haines, 272 F.3d 234 (4th Cir. 2001) 6, 9, 10

Williams v. Beck, 115 Fed. Appx. 32 (10th Cir. 2004) 11

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND COURT RULES

28 U.S.C. §1254(1) 1
28 U.S.C. §2244(d)(1) 1, 4, 7
28 U.S.C. §2244(d)(1)(A) 4
28 U.S.C. §2244(d)(2) ..... *passim*
Del. Super. Ct. Crim. R. 35(b) 8

BRIEF IN OPPOSITION

Respondent, Elizabeth Burris, Acting Warden of the Delaware Correctional Center, respectfully asks this Court to deny the petition seeking review of the July 9, 2007 judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is officially reported at 492 F.3d 478. The decision of the district court (Pet. App. 14a-28a) is not officially reported but is available at 2004 WL 2713104.

JURISDICTION

The judgment of the court of appeals was entered July 9, 2007. The petition for a writ of certiorari was filed on October 3, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

Section 2244(d)(1) of Title 28 "requires a state prisoner whose conviction has become final to seek federal habeas corpus relief within one year." *Evans v. Chavis*, 546 U.S. 189, 191 (2006). The limitations period is tolled for the "time during which a properly

filed application for State post-conviction or other collateral review . . . is pending." 28 U.S.C. §2244(d)(2). Petitioner, in March 2001, pled guilty to three felony sex offenses and was sentenced to 19 years imprisonment, suspended after 10 years imprisonment for 7½ years supervised release and probation. Petitioner applied for federal habeas relief in August 2003. The district court denied the petition, holding that the petition was untimely, being filed outside the one year limitations period established by §2244(d)(1). The court of appeals affirmed. Pet. App. 1a-13a.

1. Delaware State Police in late 1999 investigated a report that a minor girl had been sexually abused by her two brothers. When the girl's 13-year-old brother, A.C., was asked where he had learned this behavior, he revealed that he had learned the acts from petitioner the previous summer. A.C. had been introduced to petitioner while at church and, with the permission of his father, A.C. agreed to do odd jobs for petitioner in the summer of 1998 to make spending money. One incident of sexual activity between A.C. and petitioner had occurred in a state park where the two were jogging; three incidents occurred in the bathroom at petitioner's house; the fifth incident occurred in the living room of petitioner's house, petitioner also filming the various sexual acts that time. A subsequent search of petitioner's computer revealed 150 pictures police suspected to be child pornography. Gov't C.A. Brf. at 5-6.

Petitioner was arrested on December 1, 1999, and a state grand jury indicted him in February 2000, charging him with multiple counts of first degree unlawful sexual intercourse, sexual exploitation of a child, second degree unlawful sexual contact, sexual solicitation of a child, dealing in child pornography, and possession of child pornography. Petitioner pled guilty on March 29, 2001 to one count of second degree unlawful sexual intercourse and two counts of second degree unlawful sexual contact. Consistent with the plea agreement, petitioner was sentenced that same day to a total of 19 years imprisonment, suspended after 10 years for 7½ years supervised release and probation. Gov't C.A. Brf. at 3.

On June 29, 2001 and again on July 26, 2001, petitioner filed motions for sentence reconsideration, reduction, or modification under Delaware Superior Court Criminal Rule 35(b) (reproduced at Pet. App. 33a). Those motions were denied on June 25, 2002; petitioner did not appeal that decision to the state supreme court. On November 12, 2002, petitioner filed a "motion to dismiss" in the state trial court, alleging that the court had not had jurisdiction over the charges in the indictment and that counsel had been ineffective in failing to discern and pursue the jurisdictional defect. The trial court struck the motion on November 19, 2002, finding the motion to dismiss to be procedurally improper. On March 20, 2003, the state supreme court affirmed the November 19, 2002 order of the trial court striking petitioner's motion to dismiss. Pet. App. 2a-3a & n.2.

2. Petitioner applied for federal habeas relief in a petition dated August 4, 2003, advancing five claims for relief. Pet. App. 15a-16a. The district court denied petitioner's application for federal habeas relief, holding that the petition was untimely under 28 U.S.C. §2244(d)(1).

a. Petitioner was sentenced on March 29, 2001, and under state law, he had 30 days to file an appeal to the state supreme court. Petitioner's convictions thus became final on April 30, 2001. Under §2244(d)(1)(A), therefore, petitioner had until April 30, 2002 in which to file his habeas petition. The habeas petition was dated August 4, 2003, and that presumably was the date petitioner had delivered the petition to prison officials for mailing. The petition was accordingly deemed filed August 4, 2003. Pet. App. 18a-19a.

b. The statutory tolling provision of §2244(d)(2) did not save petitioner's application. The district court decided that it need not resolve the question of whether petitioner's motions for reduction of sentence had tolled the limitations period under §2244(d)(2). If the motions for reduction of sentence did in fact toll the limitations period, petitioner's federal habeas petition was still untimely. Pet. App. 20a. The November 2002 motion to dismiss, instead, did not toll the limitations period because it was not "a 'properly filed' application for state post-conviction relief." Pet. App. 20a-21a. Finally, there was no basis upon which the limitations period could be equitably tolled. Pet. App. 21a-25a.

3. The court of appeals affirmed. Pet. App. 1a-13a. The court rejected petitioner's contention that the motion to reduce his sentence triggered the tolling provision of §2244(d)(2). A motion to reduce sentence under Delaware law, according to the court, was "a plea for leniency, directed toward the sentencing court, which seeks discretionary relief based on mercy and grace, rather than on the law." Pet. App. 7a. Indeed, the trial court could reduce a defendant's sentence "'without regard to the existence of a legal defect.'" Pet. App. 7a (quoting *State v. Lewis*, 797 A.2d 1198, 1201 (Del. 2002)). Conversely, a Delaware prisoner was not required to seek a reduction of sentence in order to challenge his conviction or sentence. Pet. App. 8a.

Looking at its earlier decision in *Nara v. Frank*, 264 F.3d 310 (3d Cir. 2001), the court wrote that application of the tolling provision of §2244(d)(2) had been appropriate in *Nara* "because the [prisoner's] motion attacked the lawfulness of [his] conviction. . . ." Pet. App. 9a. Petitioner's motion to reduce his sentence was simply "a state court proceeding that is not attacking the lawfulness of the conviction or of the sentence." Pet. App. 9a. Because petitioner's motion to reduce his sentence had not challenged the validity of his conviction or of his sentence, there was no basis to apply the tolling provision of §2244(d)(2). The court noted that three other courts of appeals had considered the same question. Analyzing those decisions, the court noted its conclusion was consistent with that reached by the Fourth and Eleventh Circuits,

but contrary to that reached by the Tenth Circuit, the court "not [being] persuaded by the reasoning of the Tenth Circuit." Pet. App. 9a-11a (citing *Walkowiak v. Haines*, 272 F.3d 234 (4th Cir. 2001); *Bridges v. Johnson*, 284 F.3d 1201 (11th Cir. 2002); *Robinson v. Golder*, 443 F.3d 718 (10th Cir. 2006); *Howard v. Ulibarri*, 457 F.3d 1146 (10th Cir. 2006)). The court moreover determined that "tolling for a leniency petition" (Pet. App. 11a) would not further the purpose of the exhaustion requirement or other goals "such as comity and the desire to avoid simultaneous litigation. . . ." Pet. App. 11a-12a.[1]

ARGUMENT

Petitioner contends that this Court should grant review to resolve the conflict among the courts of appeals on the question whether a defendant's motion to modify or reduce his sentence is an "application for State post-conviction or other collateral review" under §2244(d)(2) that tolls the one year limitations period

[1] The court of appeals observed that prisoners might be inclined "to file frivolous requests for leniency merely as a delay tactic." Pet. App. 12a (citing *Lawrence v. Florida*, 127 S.Ct. 1079, 1085 (2007)). According to petitioner, that concern is overdone because of the short periods of time within which a motion for reduction of sentence must be filed. Pet. 15. That might be true with respect to motions to reduce a sentence of imprisonment, but the Delaware rule allows a prisoner to move to modify or reduce the "term or conditions of partial confinement or probation, at any time." Pet. App. 33a.

established by §2244(d)(1). The court of appeals correctly held that a motion for reduction or modification of sentence does not trigger the tolling provision of §2244(d)(2), and the conflict identified by petitioner does not warrant review at this time.

1. a. "Ordinarily, for purposes of applying a federal statute that interacts with state procedural rules, we look to how a state procedure functions, rather than the particular name that it bears." *Carey v. Saffold*, 536 U.S. 214, 223 (2002) (citing *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 72 (1946) and *Dep't of Banking of Neb. v. Pink*, 317 U.S. 264, 268 (1942)). *See Summers v. Schriro*, 481 F.3d 710, 714 (9th Cir. 2007) ("the determinative factor is how [the particular Arizona procedure] functions in the Arizona criminal justice system"); *Voravongsa v. Wall*, 349 F.3d 1, 4 (1st Cir. 2003), *cert. denied*, 541 U.S. 963 (2004) (citing *Carey*, 536 U.S. at 223 and *Artuz v. Bennett*, 531 U.S. 4, 8 (2000)). That is exactly how the court of appeals proceeded to analyze petitioner's case: reviewing Delaware law, the court distinguished a motion to reduce or modify a sentence from state procedures that allow a prisoner to challenge his conviction or sentence because of a legal flaw in the proceedings. Pet. App. 7a.[2] And writing in

---

[2] *See, e.g., Lambrix v. Singletary*, 520 U.S. 518, 525 (1997) ("as we have repeatedly recognized, the courts of appeals and district courts are more familiar than we with the procedural practices of the States in which they regularly sit") (citing cases); *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944).

2002, the Delaware Supreme Court could hardly have been more clear about the difference: Superior Court Criminal "Rule 61 addresses post-conviction relief, which requires a legal challenge to the conviction, whereas Rule 35(b) allows a reduction of sentence, without regard to the legality of the conviction." *State v. Lewis*, 797 A.2d 1198, 1200 (Del. 2002). *See id.* at 1201 ("Rule 35(b) allows for a reduction of sentence without regard to the existence of a legal defect."). A motion for reduction of sentence under Delaware law thus "does not meet any of the established standards of collateral attack." *United States v. Addonizio*, 442 U.S. 178, 186 (1979). *See id.* at 185-86 (categorizing types of errors that come within scope of collateral attack).

This understanding of Delaware criminal procedure was entirely consistent with the view held by the courts of appeals of Federal Rule of Criminal Procedure 35(b) before that rule was amended by the Sentencing Reform Act of 1984. A motion for reduction of sentence was seen as being a plea for leniency, not a challenge to the legality of the conviction or the sentence. *United States v. Cumbie*, 569 F.2d 273, 274 (5th Cir. 1978); *United States v. Maynard*, 485 F.2d 247, 248 (9th Cir. 1973); *United States v. Ellenbogen*, 390 F.2d 537, 543 (2d Cir.), *cert. denied*, 393 U.S. 918 (1968); *United States v. Sobell*, 314 F.2d 314, 331-32 (2d Cir.), *cert. denied*, 374 U.S. 857 (1963) ("It would be quite improper for this Court, by utilizing Rule 35 to reduce Sobell's sentence, to place the Government in the same position as if the issue had been

submitted to the jury and decided in his favor."); *Poole v. United States*, 250 F.2d 396, 401 (D.C. Cir. 1957) (motion for reduction of sentence "is essentially a plea for leniency and presupposes a valid conviction. [Citation omitted.] It is wholly inadequate to test the propriety of allowing a guilty plea to stand.").

b. Section 2244(d)(2) tolls the limitations period for the "time during which a properly filed application for State post-conviction or other collateral review . . . is pending." "[W]ith this language, Congress meant to include within the scope of §2244(d)(2) those 'properly filed' applications, without respect to state nomenclature or the nature of the petitioner's state confinement, that, pursuant to the wording of §2244(d)(2), seek 'review' of the 'pertinent judgment or claim.'" *Moore v. Cain*, 298 F.3d 361, 366-67 (5th Cir. 2002). The claims advanced in the state proceedings need not mirror those eventually presented in a federal habeas corpus petition,[3] but to come within the terms of §2244(d)(2), the state proceeding has to challenge the validity of the conviction or the sentence. *Sibley v. Culliver*, 377 F.3d 1196, 1200 (11th Cir. 2004) (quoting *Voravongsa*, 349 F.3d at 6). That point was emphasized by the Fourth Circuit in *Walkowiak v. Haines*, 272 F.3d 234 (4th Cir. 2001) when the court held that a motion for reduction of sentence under West Virginia law did not act to toll, under

[3] *E.g., Cowherd v. Million*, 380 F.3d 909 (6th Cir. 2004); *Carter v. Litscher*, 275 F.3d 663, 665 (7th Cir. 2001); *Tillema v. Long*, 253 F.3d 494, 502 (9th Cir. 2001).

§2244(d)(2), the limitations period: a "collateral" proceeding typically challenged "the legality of the earlier proceeding or judgment," but a motion for reduction of sentence "does not allege any error at all." 272 F.3d at 238. Similarly, the Eleventh Circuit in *Bridges v. Johnson*, 284 F.3d 1201 (11th Cir. 2002), concluding that "'sentence review is not an attack on the constitutionality or legal correctness of a sentence or judgment,'" 284 F.3d at 1204, held that proceedings before a state sentence review panel did not toll the limitations period. The court of appeals in petitioner's case correctly determined that the dispositive question was whether his motion for reduction of sentence required the state courts to "review" his conviction or sentence. Because petitioner's motion for reduction of sentence did not challenge the validity of his conviction or sentence, that motion did not trigger the tolling provision of §2244(d)(2).

2. The Tenth Circuit, as the court of appeals noted (Pet. App. 10a-11a) and as petitioner describes (Pet. 7), has decided that motions for reduction of sentence do trigger the tolling provision of §2244(d)(2). But the position of the Tenth Circuit is less clearcut than portrayed by petitioner. Notwithstanding its holdings in *Robinson v. Golder*, 443 F.3d 718 (10th Cir. 2006) and *Howard v. Ulibarri*, 457 F.3d 1146 (10th Cir. 2006), the Tenth Circuit has concluded that the sentence reduction or modification procedure available under Oklahoma law does not toll the limitations period. *Clemens v. Sutter*, 230 Fed. Appx. 832, 834 n.1 (10th Cir. 2007); *Heinken v. Higgins*, 175

Fed. Appx. 986, 988 n.2 (10th Cir. 2006); *Williams v. Beck*, 115 Fed. Appx. 32, 33 (10th Cir. 2004). Given the disparate views evidenced by the Tenth Circuit's several decisions on the issue, review by this Court is not warranted at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOSEPH R. BIDEN, III
Attorney General of Delaware

LOREN C. MEYERS
Chief of Appeals Division
Counsel of Record

ELIZABETH R. MCFARLAN
Deputy Attorney General

DELAWARE DEPARTMENT OF JUSTICE
820 N. French St.
Wilmington, DE 19801
(302) 577-8500

November 2007